Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JOAN WAGNON, Secretary, Kansas Department of Revenue, SHEILA WALKER, Director of Vehicles, State of Kansas, and WILLIAM SECK, Superintendent, Kansas Highway Patrol, State of Kansas, in their official capacities,

Petitioners,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) should be applied to preempt a State's off-reservation enforcement of its motor vehicle code.

2) Should the Court abandon the *White Mountain Apache* interest-balancing test in favor of a preemption analysis based on the principle that Indian immunities are dependant upon congressional intent?

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OPINIONS BELOW

The March 25, 2005, decision of the United States Court of Appeals for the Tenth Circuit is reported at 402 F.3d 1015 (10th Cir. 2005), and is included in the petition appendix. The decision of the District Court is reported at 276 F.Supp.2d 1168 (D. Kan. 2003) This decision is also included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals issued its decision in this case on March 25, 2005. This petition has been filed within ninety (90) days of that date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 provides that

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

18 U.S.C. § 3243 in pertinent part provides that

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over

> offenses committed elsewhere within the State in accordance with the laws of the State.

Kan. Stat. Ann. § 8-142 (2001) provides that

> It shall be unlawful for any person to commit any of the following acts and except as otherwise provided, violation is subject to penalties provided in K.S.A. 8-149, and amendments thereto:
>
> *First:* To operate, or for the owner thereof knowingly to permit the operation, upon a highway of any vehicle, as defined in K.S.A. 8-126, and amendments thereto, which is not registered, or for which a certificate of title has not been issued or which does not have attached thereto and displayed thereon the license plate or plates assigned thereto by the division for the current registration year, including any registration decal required to be affixed to any such license plate pursuant to K.S.A. 8-134, and amendments thereto, subject to the exemptions allowed in K.S.A. 8-135, 8-198[,] and 8-1751a, and amendments thereto.
>
> *Second:* To display or cause or permit to be displayed, or to have in possession, any registration receipt, certificate of title, registration license plate, registration decal, accessible parking placard or accessible parking identification card knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

STATEMENT

1. *Nature of the Suit.* Prairie Band Potawatomi Nation (hereinafter, "Respondent"), filed suit against various Kansas State officials seeking declaratory and injunctive

relief against the State to prohibit the State from enforcing its motor vehicle registration and titling laws off-reservation against any person who owned or operated a vehicle registered and licensed under tribal laws driven beyond the boundaries of Respondent's reservation.

2. *The District Court Proceedings.* Citing the balance-of-interests test articulated in *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980), the district court determined that the federal and tribal interests preempted the State's interests and permanently enjoined and restrained the State of Kansas from further application and enforcement of its motor vehicle registration or titling laws against Respondent, its members and any persons who operates or owns a vehicle properly registered and titled under Respondent's motor vehicle code. Pet. App. 79. The order applied to vehicles driven both on and off of Respondent's reservation. Pet. App. 79.

3. *The Court of Appeals' Decision.* The Court of Appeals, reviewing the District Court's decision affirmed the district court's Order. Pet. App. 25. The Court of Appeals concluded that the *White Mountain Apache* balance-of-interests test is appropriate to analyze, and ultimately strike, the off-reservation enforcement by the State of Kansas motor vehicle laws against Respondent and its members. Pet. App. 17-19.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Conflicts with Precedent from This Court Concerning Applicability of the *White Mountain Apache* Balancing Test, and Creates a Schism Between Federal Circuit Courts of Appeal.

The Court of Appeals determined that nondiscriminatory state motor vehicle laws, enforced off-reservation, are preempted under the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). As a practical matter, the Court of Appeals has now invoked preemption-by-implication as an appropriate standard to reach beyond a tribe's geographical reservation boundary and strike an otherwise lawful, nondiscriminatory State law imposed off-reservation. This was error.[1]

White Mountain Apache only involved the on-reservation activity of a non-Indian company. This Court addressed only the "difficult question" of applying state law to the on-reservation activity of non-Indians when it announced its preemption analysis that embodies the balance-of-interests test. This Court thus cited the settled rule three years later in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), that "[o]ur cases have recognized that tribal sovereignty contains a 'significant geographical component,'" *id.* at 335 n.18, and, as a result, held that "the off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the

[1] Whether the *White Mountain Apache* balancing test is appropriate in the context of off-reservation taxation by a State is the subject of a case currently pending before this Court. *Richards v. Prairie Band of Potawatomi Nation*, Case No. 04-631.

contrary,'" *id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 148-49 (1973)).

Given *White Mountain Apache's* express recognition of that rule, states have operated on the assumption that, at a *minimum*, they are free to apply their nondiscriminatory laws off-reservation, even against tribes or their members without reference to an *ad hoc* and amorphous test used to resolve only the validity of on-reservation state regulation of nonmembers doing business with tribal entities. *See Mescalero Apache Tribe*, 411 U.S. at 148-49 ("State authority over Indians is yet more extensive over activities . . . not on any reservation. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.").

This Court has regularly endorsed this principle. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 468 (1995); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983). Given the force and history of the Court's pronouncements in this regard, it is remarkable that the Court of Appeals did not even pause to consider the point. In any event, the attempt of the Court of Appeals to apply the *White Mountain Apache* rule to off-reservation regulation by the State is directly contrary to the repeated statements and holdings of this Court, and itself merits the grant of certiorari.

In explaining the doctrinal basis for the *White Mountain Apache* test, this Court stated that the "tradition of

Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *White Mountain Apache*, 448 U.S. at 143. In articulating the test itself, the Court required examination of the language of "federal treaties and statutes" in addition to the "notions of sovereignty that have developed from historical traditions of tribal independence." *Id.* at 144-45. The test is directed at the on-reservation intersection of tribal and state sovereignty; it would be doctrinal error to transport the doctrine off-reservation because there is no "tradition of Indian sovereignty" off reservation.

The Court of Appeals' decision constitutes a marked departure from the path-marking *Mescalero Apache Tribe* and its progeny. The decision below leaves substantial doubt concerning a State's ability to regulate Indians off-reservation through nondiscriminatory state laws. The Court of Appeals' decision dramatically departs from controlling authority from this Court, and sharply contrasts with the Ninth Circuit that the balance-of-interests test does not apply to off-reservation state regulation and enforcement of state law against Indians.

Long ago this Court held that in the absence of federal legislation, a state may rightfully prescribe uniform regulations with respect to its highways for all vehicles including those engaged in interstate commerce. *Hendrick v. Maryland,* 235 U.S. 610, 622 (1915). A state may require registration and licensing of such vehicles and charge reasonable fees. *Id.*

Moreover, this Court has held that a state is not automatically barred from applying its laws even if they

may significantly touch the political and economic interests of tribes. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 157 (1980) (discussing Indian commerce clause).

The Court of Appeals' decision ignored or swept aside the principles laid down in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) that have been followed up through and including *Nevada v. Hicks*, 533 U.S. 353 (2001), that states may regulate the activities of Indians off-reservation. The corollary to this principle is that tribal activity simply cannot extend beyond the bounds of a tribe's reservation to preempt off-reservation state law.

Most telling on this point is *Nevada v. Hicks*, 533 U.S. 353 (2001). Justice Scalia, writing for the majority, found constitutionally unembarrassed the on-reservation execution of a state court-issued search warrant against a tribal member in connection with an off-reservation violation of state game law. This Court observed, citing *Mescalero Apache* as authority, that "[i]t is . . . well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation." *Id.* at 362.[2] The Court then held that such "authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes" (*id.* at 363) because

[2] Kansas too has criminal jurisdiction over reservation Indians. 18 U.S.C. § 3243 provides that: "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State."